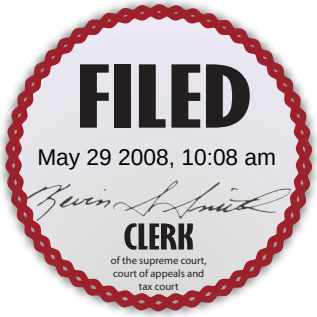

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IN THE
COURT OF APPEALS OF INDIANA

MATTHEW R. JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-0711-CR-934
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne L. Voorhees, Judge
Cause No.18C01-0601-FB-29

May 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Matthew Johnson appeals his sentence for robbery, a Class B felony. Johnson argues that the trial court abused its discretion in finding the aggravating and mitigating circumstances and that his sentence is inappropriate. Concluding the trial court acted within its discretion and Johnson's sentence is not inappropriate, we affirm.

Facts and Procedural History

We have limited information regarding Johnson's offense, as neither party has requested a transcript of the guilty plea hearing. Johnson's appellate brief does not give a statement of the facts surrounding the offense, stating merely that he pled guilty to armed robbery.[1] The probable cause affidavit contained in the appellant's appendix indicates that on October 30, 2006, Johnson, who was sixteen at the time, along with his cousin, Josh Smith, who was twenty-six at the time, entered a store in Delaware County "armed with a knife, and the knife was held to the clerks [sic] throat while money was removed from the cash register." Appellant's Appendix at 11.

On November 8, 2006, the State charged Johnson with armed robbery, a Class B felony. On August 2, 2007, Johnson entered into a plea agreement under which he agreed to plead guilty to robbery, and to another armed robbery committed in Blackford County. In exchange, the State agreed that the sentences would run concurrently. The trial court took the plea under advisement and accepted it at the sentencing hearing, held

[1] We direct Johnson's counsel to Appellate Rule 46(A)(6), requiring that an appellate brief's statement of facts "shall describe the facts relevant to the issues presented." As our review of a sentence involves an analysis of the nature of the offense, a description of the offense is clearly relevant.

on September 24, 2007. Following the hearing, the trial court issued an Order on Sentencing Hearing, which states in relevant part:

> Circumstances Supporting an Enhanced Sentence
> 1. Defendant has an extensive record of delinquent activity, which would have been misdemeanors if committed as an adult; these include [three counts of battery, possession of marijuana, possession of alcohol by a minor, and public intoxication.] The Court gives these adjudications some weight, as they indicate a pattern of delinquent activity dating back to the year 2002.
> 2. Defendant was adjudicated a delinquent in the following cases, which would have [been] felonies if he had been an adult: [burglary, receiving stolen property, residential entry, two counts of theft, and possession of a controlled substance without a prescription; and criminal mischief and battery as misdemeanors.] The Court gives these adjudications great weight, as the cases establish a pattern of burglary and theft convictions. These offenses are similar to the one involved in this case.
> 3. The defendant has recently violated the conditions of formal probation . . . .
> Circumstances Supporting a Reduced Sentence
> 1. The defendant has assumed responsibility for his actions and pleaded guilty to the instant offense; however, the Court gives this factor minimal weight, as Defendant received a significant benefit from the plea, i.e., the State's agreeing to concurrent sentences . . . .
> 2. The defendant states and appears to be remorseful; however, the Court gives this factor minimal to no weight, as Defendant has had numerous opportunities to rehabilitate himself and straighten out his life and has failed to do so.
> 3. The Defendant's youthful age; Defendant was Sixteen (16) [y]ears old at the time of the instant offense. The Court gives this factor minimal weight, however, due to the fact that this offense involved robbery with a deadly weapon.
> 4. The Defendant has some support in his family; however the Court gives this factor minimal weight, as Defendant has continued to commit serious offenses all through his childhood, even while having this family support.
> 5. Defendant may have been strongly influenced by his older cousin (and co-defendant) when he committed this offense; however, the Court gives this factor some weight, although minimal weight, given the serious nature of this offense . . . .

Appellant's App. at 86-87. The trial court went on to discuss Johnson's previous opportunities for rehabilitation, including psychiatric counseling, home-based treatment, mentoring programs, and probation. The trial court found that the "factors supporting an enhanced sentence significantly outweigh the factors supporting a reduced sentence, supporting the imposition of a slightly enhanced sentence." Id. at 87. The trial court sentenced Johnson to twelve years, with four years suspended to probation, to run concurrently with Johnson's sentence for the unrelated robbery. Johnson now appeals.

Discussion and Decision

Although Johnson identifies the issue raised as whether his sentence is inappropriate, he does not frame his argument in terms of the nature of the offense[2] and his character.[3] See Ind. Appellate Rule 7(B). Instead, Johnson argues the trial court "failed to give proper weight to several mitigating factors," appellant's brief at 5, and claims that "[i]f the trial court had properly weighed the factors, an imposition of the minimum sentence would be appropriate," id. at 7. Johnson apparently has overlooked our supreme court's decision in Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218, indicating that "a trial court can not now be said to have abused its discretion in failing to 'properly weigh' such factors." Therefore,

[2] As stated above, Johnson has not even described the nature of the offense, much less explained why it renders his sentence inappropriate.

[3] Under the heading "Standard of Proof," which we assume Johnson intends to be the "Standard of Review," Johnson refers to Rule 7(B). However, he then cites a case decided under the presumptive sentencing scheme, which has not been in effect since April 25, 2005, Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied, and identifies the standard of review that we used when reviewing a trial court's finding and weighing of the aggravating and mitigating circumstances under the old sentencing scheme. See Appellant's Brief at 5 (citing Allen v. State, 719 N.E.2d 815, 817 (Ind. Ct. App. 1999), trans. denied).

Johnson's claim that the trial court gave insufficient weight to particular mitigating circumstances must fail.[4]

As the trial court entered a sentencing statement adequately explaining its reasoning for imposing its sentence, the sole basis on which Johnson may challenge his sentence is under Appellate Rule 7(B). Anglemyer, 868 N.E.2d at 491. Although Johnson identifies this appellate rule, he makes no discernable argument that the nature of the offense or his character renders his sentence inappropriate, and he cites no cases applying Rule 7(B), or for that matter, any cases discussing the relevant weight of the mitigating circumstances to which he claims the trial court gave insufficient weight. Thus, Johnson has waived appellate review of his sentence under Rule 7(B). See McMahon v. State, 856 N.E.2d 743, 751 (Ind. Ct. App. 2006) (holding the defendant

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[4] Johnson does state that the trial court failed to take Johnson's "mental problems into consideration at all when sentencing [Johnson]." Appellant's Br. at 6. However, a review of the sentencing transcript clearly indicates the trial court considered this circumstance. See Tr. at 42 (trial court noting Johnson's psychiatric counseling and treatment); id. at 44 (trial court recommending that Johnson "be placed in a facility where [he] can address [his] drug and alcohol addiction and [his] mental health issues"). Further, even if the trial court had overlooked Johnson's evidence relating to his mental health issues, Johnson has cited no authority in arguing that the trial court would have abused its discretion in doing so. Therefore, this issue is waived. See Smith v. State, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005) (recognizing that a party waives an issue by failing to "provide adequate citation to authority and portions of the record"), trans. denied. Indeed, to establish that the trial court abused its discretion by allegedly failing to consider Johnson's mental health issues, Johnson would have had to demonstrate that this alleged mitigating circumstance was significant. See Anglemyer, 868 N.E.2d at 493. The significance of mental health issues at sentencing turns on: "(1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime." Ankney v. State, 825 N.E.2d 965, 973 (Ind. Ct. App. 2005) (citing Archer v. State, 689 N.E.2d 678, 685 (Ind. 1997)), trans. denied. To ensure Johnson that his case received comprehensive review, and based on our preference for deciding issues on their merits, see Collins v. State, 639 N.E.2d 653, 655 n.3 (Ind. Ct. App. 1994), trans. denied, we also note that had the issue not been waived, and had the trial court failed to consider Johnson's mental health, we would not have found an abuse of discretion, as the record does not reveal that Johnson was unable to control his behavior, the extent of his mental health issues, or any nexus between his mental health and the commission of the instant crime.

waived his challenge to his sentence by failing to make a cogent argument or cite authority supporting his argument); Gentry v. State, 835 N.E.2d 569, 576 (Ind. Ct. App. 2005) (holding that the defendant's "failure to offer more than a mere conclusory statement that his sentence should be reduced waives his opportunity for appellate review").[5]

However, in the interest of justice, we have reviewed the record[6] and conclude that Johnson's sentence is not inappropriate given the nature of his offense (or at least what we can discern regarding the nature of the offense) and his character. We recognize, from our review of the sentencing transcript, that Johnson has had a difficult childhood, was only sixteen years old when he committed the offense, and was acting upon the urging of his older cousin. However, as the trial court's sentencing statement indicates,

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[5] We note that this court has found it necessary on several previous occasions to remind Johnson's counsel that arguments must be supported by cogent argument and applicable authority. See Tamsett v. State, 879 N.E.2d 1231, 2008 WL 204698 (Ind. Ct. App. 2008) (unpublished opinion) (noting that counsel cited an outdated version of Rule 7(B)); Gray v. State, 876 N.E.2d 387, 2007 WL 3244230 (Ind. Ct. App. 2007) (unpublished opinion) (noting that counsel cited an outdated version of Rule 7(B), and "caution[ing] counsel to conduct a more thorough legal research process in the future"); Stanley v. State, 874 N.E.2d 650, 2007 WL 2916451 (Ind. Ct. App. 2007) (unpublished opinion) (holding issue waived based on failure to make a cogent argument or cite to relevant authority); Ruble v. State, 873 N.E.2d 202, 2007 WL 2473232 (Ind. Ct. App. 2007) (unpublished opinion) (indicating that counsel "misstates the issue," and cites authorities that are "either obsolete, inapplicable, repealed or replaced by other authorities," and declining to address the merits based on counsel's failure to make cogent argument); Sharp v. State, 835 N.E.2d 1079, 1084 n.8 (Ind. Ct. App. 2005) (holding argument waived based on failure to make cogent argument). We urge counsel to perform adequate research and put forth cogent arguments for his clients, who have a constitutional right to effective assistance of appellate counsel.

[6] We note that Johnson included his pre-sentence report in his appendix, but that this report was neither printed on green paper nor conspicuously labeled "confidential" or "not for public access," as required by Indiana Appellate Rule 9(J) and Indiana Trial Rule 5(G). See also Ind. Admin. Rule 9(G)(1)(b)(viii) (indicating that pre-sentence reports are confidential and excluded from public access). We instruct counsel to comply with this requirement in the future. See Hamed v. State, 852 N.E.2d 619, 621 (Ind. Ct. App. 2006). We note that this is not the first time we have reminded counsel of this requirement. See Tamsett, 879 N.E.2d 1231, 2008 WL 204698.

Johnson has an extremely lengthy history of committing offenses that would be crimes had he been an adult. Many of these offenses occurred recently and involve harm to other persons or their property. See Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006) (recognizing that the weight of a defendant's criminal history "is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability"). Further, Johnson committed the instant offense while on probation. See Ryle v. State, 842 N.E.2d 320, 325 n.5 (Ind. 2005), cert. denied, 127 S.Ct. 90 (2006). The trial court sentenced Johnson to twelve years, only two years above a Class B felony's advisory sentence, which is the "starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). Under these circumstances, we are unable to conclude that Johnson's sentence is inappropriate.[7]

Conclusion

We conclude the trial court did not abuse its discretion and Johnson's sentence is not inappropriate.

Affirmed.

BAKER, C.J., and RILEY, J., concur.

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[7] We also note that it appears from the transcript that Johnson has made strides toward bettering himself and appears remorseful for the numerous delinquent acts he has committed. Although we do not believe these attempts render his sentence inappropriate, cf. Settles v. State, 791 N.E.2d 812, 815 (Ind. Ct. App. 2003) ("It was within the trial court's discretion to find that [the defendant's] rehabilitation process during his incarceration was not a significant mitigating factor."), we commend Johnson for his attempts at self-improvement, and sincerely hope he follows through with them.